No. 13,659

IN THE

United States Court of Appeals

For the Ninth Circuit

FARMLAND IRRIGATION COMPANY, INC., a corporation,

Appellant,

vs.

GEORGE DOPPLMAIER,

Appellee.

Brief for Appellant

NAYLOR AND LASSAGNE
THEODORE H. LASSAGNE, ESQ.
420 Russ Building
San Francisco 4, California
Attorneys for Appellant

L. R. GEISLER, ESQ.
Platt Building
Portland 5, Oregon
Of Counsel

PARKER PRINTING COMPANY, 180 FIRST STREET, SAN FRANCISCO

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Brief for Appellant

This is an appeal of an applicant for intervention in an action for the recovery of royalties alleged to be due under a patent license agreement; the United States District Court for the District of Oregon having denied appellant's motion for leave to intervene.

JURISDICTIONAL STATEMENT

The Complaint in this action, denominated a "Claim for Accounting and Other Relief" (Record, page 3) alleged the plaintiff George Dopplmaier to be a citizen of the State of California and the defendant Stout Irrigation, Inc. to be an

Oregon corporation; and further alleged "that the controversy between plaintiff and defendant involved in this litigation is a sum in excess of $3,000.00 exclusive of interest and costs" (Record, p. 4).

The Answer (Record, p. 15) admitted the allegations of the Complaint as to the citizenship of the parties (Record, p. 16) and admitted that the plaintiff claimed a sum in excess of $3,000.00 exclusive of interest and costs (Record, p. 17).

The District Court therefore acquired original jurisdiction under the provisions of Title 28, U. S. Code, § 1332(a)(1) providing that the District Courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000.00 exclusive of interest and costs and is between citizens of different states.

Subsequent to the filing of the Complaint by the plaintiff George Dopplmaier and the filing of the Answer of the original defendant Stout Irrigation, Inc., appellant Farmland Irrigation Company, Inc. filed a "Motion to Intervene as a Defendant" (Record, p. 18), basing its motion on that part of Rule 24, Federal Rules of Civil Procedure, reading as follows:

> "(a) *Intervention of Right.* Upon timely application anyone shall be permitted to intervene in an action: * * * (a) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action: * * *."

Thereafter, on November 10th, 1952, the United States District Court entered an order denying this Motion to Intervene (Record, p. 36).

The jurisdiction of this Honorable Court arises under Title 28, U. S. Code, § 1291; the aforesaid denial of appellant's Motion to Intervene being a final adjudication because the case is one in which the right to intervene is absolute as distinguished from one in which the action of the District Judge will be viewed as discretionary.

U. S. v. Philips, Judge, 107 Fed. 824 (C.A. 8); (1901).

STATEMENT OF THE CASE

On December 5th, 1949 one Darrel C. Mansur, of Newberry, California, entered into a "License Agreement" (Record, pp. 5-15) with Stout Irrigation, Inc., an Oregon corporation, granting the latter a license to make and sell certain irrigation apparatus. Plaintiff George Dopplmaier, appellee here, is the assignee of the rights of said Darrel C. Mansur under said agreement (Complaint, Par. III, Record, p. 3; Answer, Par. III; Record, p. 16).

A dispute having arisen between said George Dopplmaier and Stout Irrigation, Inc. as to the amount of royalties due under said agreement, Dopplmaier, on June 6th, 1951 (Record, p. 34), filed a Complaint in the U. S. District Court for the District of Oregon denominating the same a "claim for accounting and other relief" (Record, pp. 3-5). On October 8th, 1951 (Record, p. 34) the defendant Stout Irrigation, Inc. filed its Answer (Record, pp. 15-17).

Thereafter, on May 22nd, 1952, Farmland Irrigation Company, Inc., a California corporation, the appellant here, filed a "Motion to Intervene as a Defendant" (Record, p. 18) supported by an affidavit of J. M. Kroyer, its vice-president (Record, pp. 19-20), setting forth that on February 1st, 1952 said Farmland Irrigation Company, Inc. by contract

acquired all of the assets of Stout Irrigation, Inc., the original defendant in this action, and bound itself contractually to assume all of the liabilities of the said Stout Irrigation, Inc., including any liability which might be adjudged against Stout Irrigation, Inc. in this action.

It was further alleged in the "Motion to Intervene as a Defendant" and supporting affidavit of Kroyer that by reason of such facts and of the dissolution of the defendant Stout Irrigation, Inc., the representation of the interest of Farmland Irrigation Company, Inc., the applicant for intervention, by the existing party Stout Irrigation, Inc., would be inadequate (Record, p. 18); that Farmland Irrigation Company, Inc. was a corporation duly organized and existing under the laws of California and duly qualified to do business in the State of Oregon; and that it had acquired the assets and assumed the liabilities of Stout Irrigation, Inc. with the object of constituting itself the successor of Stout Irrigation, Inc. and of carrying on the business of manufacturing and selling sprinkler irrigation equipment previously carried on by Stout Irrigation, Inc., which it has since actively done and expected to continue so to do (Record, p. 20).

By an order entered November 10th, 1952 (Record, pp. 27-28), the District Court denied the Motion to Intervene.

A "Motion of Intervening Defendant to Dismiss" (Record, p. 26) was filed in behalf of Farmland Irrigation Company, Inc. concurrently with its Motion to Intervene and based on the ground that, it being an indispensable party to the action, its intervention as a defendant would destroy the previously existing diversity of citizenship, causing the court to lose jurisdiction to proceed in the action and requiring a

dismissal. This motion was treated by the District Court as contingent upon allowance of the Motion to Intervene and as becoming moot with its denial. Therefore, as appears from the District Court's order of November 10th, 1952 (Record, pp. 27-28) and the docket entry of that date (Record, p. 36), no order was entered either granting, denying or dismissing the said "Motion of Intervening Defendant to Dismiss."

Questions Presented.

The present appeal presents two questions:

1. Is appellant entitled to intervene in this action as a matter of right?
2. Does the jurisdiction of the District Court survive the intervention sought?

SPECIFICATIONS OF ERROR

The errors relied upon and urged on this appeal are as follows:

1. The District Court erred in denying Appellant's Motion to Intervene as a Defendant in this action.
2. The District Court erred in declining to rule upon Appellant's Motion to Dismiss this action.

SUMMARY OF ARGUMENT

1. Appellant is entitled to intervene in this action as a matter of right because:

(a) The representation of the applicant for intervention by the existing defendant, Stout Irrigation, Inc., is and will be inadequate, because Stout Irrigation, Inc. has no interest in defending the action in

view of the contractual assumption of all of its liabilities by Appellant, including any liability which might be adjudged against said Stout Irrigation, Inc. in this action;

(b) The applicant for intervention will be bound by a judgment in the action by its contractual assumption of the liabilities of Stout Irrigation, Inc.; and

(c) The provisions of Rule 24(a) of the Federal Rules of Civil Procedure provide for intervention *as a matter of right* under the circumstances set forth in points (a) and (b) above.

2. The jurisdiction of the District Court does not survive this intervention, because:

(a) The applicant for intervention, Farmland Irrigation Company, Inc., is an indispensable party to this action, because a decree made in the absence of Farmland Irrigation Company, Inc. as a party would have a manifest injurious effect on the interest of such absent party.

(b) Jurisdiction is dependent upon diversity of citizenship.

ARGUMENT

First Point

The first point urged on this appeal is that the petitioner for intervention is entitled to intervene *as a matter of right.*

THE REPRESENTATION OF THE INTEREST OF APPLICANTS FOR INTERVENTION BY EXISTING PARTIES IS AND WILL BE INADEQUATE.

The record shows, without contradiction, that the applicant for intervention, Farmland Irrigation Company, Inc. has acquired the assets and assumed the liabilities of the

original defendant Stout Irrigation, Inc. with the object of constituting itself the successor of that company and of carrying on the business of manufacturing and selling sprinkler irrigation equipment previously carried on by that company, and that it has since actively carried on that business and expects to continue to do so (Record, p. 20).

A party claiming to have succeeded to the interest of an existing party to an action and without representation of its own interest in the case is entitled to intervene as a matter of right. *This is true even though the succession occurred after the institution of the action in which intervention is sought.*

Deauville Associates, Inc. v. Eristavi-Tchitcherine, 173 Fed.(2d) 745 (C.A. 5; 1949).

THE APPLICANT FOR INTERVENTION WILL BE BOUND BY A JUDGMENT IN THE PRESENT ACTION.

The record shows, without contradiction, that the petitioner for intervention, Farmland Irrigation Company, Inc., has bound itself contractually to assume all of the liabilities of the original defendant Stout Irrigation, Inc., including any liability which may be adjudged against that corporation in this action (Record, p. 19).

A judgment against a defendant who has a right of action to recover over against a third party is conclusive upon the latter provided he has notice and a full opportunity to defend. This is true whether the right of action arises by operation of law or, as here, by express contract.

Washington Gaslight Co. v. District of Columbia, 161 U.S. 316, 329; 16 S.Ct. 564; 40 L.Ed. 712.

Thus in an action by a subcontractor against the surety on a general contractor's bond, the general contractor may in-

tervene as a defendant since it would be bound by a judgment against its surety entered after it had received notice of the suit and it was entitled to an opportunity to defend. Furthermore, a counterclaim is allowable without independent jurisdiction where it is based on the same contract on which the original plaintiff sued.

U. S. ex rel. Foster Wheeler Corp. v. American Surety Co., 142 Fed.(2d) 726 (C.A. 2; 1944).

RULE 24(a) FRCP PROVIDES FOR INTERVENTION AS A MATTER OF RIGHT UNDER THESE CIRCUMSTANCES.

The pertinent provisions of Rule 24(a) of the Federal Rules of Civil Procedure applicable to this situation read as follows:

> "(a) *Intervention of Right.* Upon timely application anyone shall be permitted to intervene in an action: * * * (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; * * *."

Second Point

The second point urged on this appeal is that the jurisdiction of the Court does not survive this intervention, because the intervenor is an indispensable party and a citizen of the same state as plaintiff, and the jurisdiction is dependent upon diversity of citizenship.

THE APPLICANT FOR INTERVENTION, FARMLAND IRRIGATION COMPANY, INC. IS AN INDISPENSABLE PARTY.

Unless it can be affirmatively held that the decree sought in the present case would, in the absence of Farmland Irrigation Company, Inc. as a party have no injurious effect on the interest of the applicant for intervention, then the applicant for intervention is an "indispensable" party.

In *State of Washington v. United States,* 87 Fed.(2d) 421, 427, this Court set up the following criteria to be applied in determining whether an absent party is indispensable:

> "After first determining that such party is interested in the controversy, the court must make a determination of the following questions applied to the particular case: (1) Is the interest of the absent party distinct and severable? (2) In the absence of such party, can the court render justice between the parties before it? (3) *Will the decree made, in the absence of such party, have no injurious effect on the interest of such absent party?* (4) Will the final determination, in the absence of such party, be consistent with equity and good conscience?
>
> "If, after the court determines that an absent party is interested in the controversy, it finds that all of the four questions outlined above are answered in the affirmative with respect to the absent party's interest, then such absent party is a necessary party. However, *if any one of the four questions is answered in the negative, then the absent party is indispensable.*" (Emphasis added.)

Since it has been shown above that the original defendant Stout Irrigation, Inc. has a right of action under its contract with Farmland Irrigation Company, Inc. to recover over against the latter and that Farmland Irrigation Company, Inc. has had notice of the present action and sought by this petition for intervention a full opportunity to defend it, any judgment rendered against Stout Irrigation, Inc. herein would be conclusive upon Farmland Irrigation Company, Inc.

Washington Gaslight Co. v. District of Columbia, supra, 161 U.S. 316, 329; 16 S.Ct. 564; 40 L.Ed. 712.

Under these circumstances it obviously cannot be affirmatively asserted that a decree made in the absence of Farmland Irrigation Company, Inc. as a party would have no injurious effect on the interest of that party. Therefore, under the circumstances, Farmland Irrigation Company, Inc. must be regarded as an indispensable party.

THE REQUIRED INTERVENTION DESTROYS THE JURISDICTION AND REQUIRES DISMISSAL OF THE ACTION.

The record shows that the plaintiff, George Dopplmaier, appellee here, and the party Farmland Irrigation Company, Inc. petitioning for leave to intervene as a defendant, are citizens of the same state. The Complaint (Record, p. 3) alleges that plaintiff George Dopplmaier is a citizen of the State of California. The affidavit of J. M. Kroyer supporting the Motion to Intervene as a defendant, states (Record, p. 20) that Farmland Irrigation Company, Inc., is a corporation duly organized and existing under the laws of the State of California. As appears from the jurisdictional statement in this brief (ibid, pp. 1-2), the jurisdiction of the District Court herein is based solely upon diversity of citizenship and amount in controversy. Thus, the intervention of an indispensable party will destroy the necessary diversity of citizenship and result in a loss of jurisdiction.

It was established at an early date that the absence in an action of indispensable parties requires dismissal of an action.

> *State of California v. Southern Pacific Co.*, 157 U.S. 229; 39 L.Ed. 683.

This basic rule has been applied to situations such as the present one in which an indispensable party petitions to

intervene and in such situations it has been held that where, upon proper alignment of the intervenor as a plaintiff or defendant his citizenship destroys the previously existing diversity of citizenship, the District Court loses jurisdiction to proceed in the action.

Kentucky Natural Gas Corp. v. Duggins, 165 Fed. (2d) 1011 (C.A. 6).

"When Federal jurisdiction is grounded on diversity of citizenship such diversity of citizenship must exist between all the plaintiffs on the one hand and all the defendants on the other. If the person is an indispensable party to the action it is necessary that he be made a party to the suit either as a plaintiff or a defendant, and he will be aligned by the Court in accordance with his real interest in the controversy, even though such an alignment may destroy the necessary diversity of citizenship and result in a loss of jurisdiction. Schuckman vs. Rubenstein et al., 164 F.(2d) 952, CCA 6th, decided December 12, 1947; Farr. v. Detroit Trust Company, 116 F.(2d) 807, 811, CCA 6th; Baltimore and Ohio R.R. Co. v. Parkersburg, 268 U.S. 35. Compare Atwood v. National Bank of Lima, 115 F.(2d) 861, CCA 6th. In the application of this rule parties to an action are classified as (1) formal parties, (2) necessary but not indispensable parties, and (3) indispensable parties, who are defined as 'Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.' Shields, et al. v. Barrow, 17 Howard, 130; Minnesota v. Northern Securities Co., 184 U.S. 199, 246; Schuckman v. Rubenstein, et al., supra, CCA 6th.

These well settled rules are applicable when an intervening petition makes new parties to an action over which the Court has previously acquired jurisdiction by reason of diversity of citizenship. If the new parties so brought into the action are not indispensable parties jurisdiction continues to exist. Wichita R. & Light Co. vs. Public Utilities Commission, 260 U.S. 48; Stewart v. Dunham, 115 U.S. 61. However, if the intervening petition is not one merely ancillary to the main action, such as asserting a right in property or a fund in possession of the Court, and brings into the action an indispensable party, and upon proper alignment his citizenship destroys the previously existing diversity of citizenship, the District Court loses jurisdiction to proceed in the action. Kendrick v. Kendrick, 16 F.(2d) 744, CCA 5th; Forest Oil Co. v. Crawford, 101 F. 849, CCA 3d; Johnson v. Riverland Levee District, 117 F.(2d) 711, CCA 8th, Annotation 134 A.L.R., 335, 351 through 355; Charleston National Bank v. Oberreich, 34 F. Supp. 329, E.D. Ky. See also Wichita R. & Light Co. v. Public Utilities Commission, supra, at p. 54; Galbraith v. Bond Stores, 4 F.R.D. 319, W.D. Mo."

"The judgment of the District Court is reversed, and the action remanded to that court for the entry of a judgment dismissing the action without prejudice, unless jurisdiction can be shown by amended pleadings."

CONCLUSION

It is submitted to be unequivocally clear that appellant has established its right to intervene in this case and that the Order of the District Court denying its Motion to Intervene should be reversed.

The disposition of the subsidiary question as to the survival of jurisdiction depends upon the discretion of this Court. The District Court has not ruled upon the Motion to Dismiss. If the decision of this Court is limited to reversal of the Order denying the Motion to Intervene, the District Court will be required to rule upon the Motion to Dismiss. This may result in a second appeal on substantially the same record.

It is submitted therefore that important economies of time and effort will be effected if this Court either directs a dismissal of this action at this stage or, at the least, expresses its views on the merits of the Motion to Dismiss.

Dated, March 20, 1953.

Respectfully submitted,

NAYLOR AND LASSAGNE
THEODORE H. LASSAGNE
Attorneys for Appellant

L. RAPHAEL GEISLER
Of Counsel